Supreme Court, U.S.
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No. 03-

IN THE

Supreme Court of the United States

SYLVIA KNOHR WYATT;
BARBARA KNOHR-HURTADO,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Issues surrounding the nature of the limitations period of the Federal Tort Claims Act continue to perplex many lower Courts. In addition to a split amongst the Circuits on such issues, there also exists a conflict in the decisions within some Circuits, such as the 5th, 6th and 7th Circuits. The consequence of such confusion is a hesitancy of the Courts to apply the equitable doctrines of estoppel and/or tolling to cases that involve a waiver of sovereign immunity under the FTCA. The case presently before the Court precisely demonstrates the injustice that results from this unanswered question of law.

1. Whether the limitations period of the Federal Tort Claims Act is subject to the equitable doctrines of tolling and estoppel, and is, therefore, not jurisdictional in nature.

2. Whether the courts below erred in ruling that under the Federal Tort Claims Act the plaintiffs' claims accrued, even though they had no knowledge that they were tort victims and they were kept from gaining such knowledge by the tortfeasor itself, which purposefully and fraudulently withheld all information regarding its conduct, which ruling was made despite its being in conflict with prior decisions of other Circuits and its own previous holdings.

3. Whether the courts below erred in ruling that, despite the government's active concealment of material facts, the plaintiffs failed to exercise due diligence in discovering their cause of action, which ruling was made despite the conflict that exists among the circuits concerning this issue.

4. Whether the trial court erred by upsetting its own order which originally recognized that the statute of limitations had been tolled in this case.

5. Whether the appellate court erred in failing to apply a de novo standard of review to the lower court's determination on a motion to dismiss for lack of subject matter jurisdiction and of when a claim accrues as a matter of law under the Federal Tort Claims Act.

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OPINION BELOW

The Fifth Circuit Court of Appeal did not select its Per Curiam opinion for publication in the Federal Reporter. The decision is reported at 81 Fed. Appx. 508 (2003). The District Court did not publish an opinion in this case. Its pertinent rulings adopting the recommendations of a Magistrate are reprinted in Appendix A.

STATEMENT OF JURISDICTION

The Fifth Circuit filed its decision on December 1, 2003, and entered an order denying petitioners' motion for rehearing on February 2, 2004 (Appendix F). This Court has jurisdiction under 28 U.S.C. § 1254(1) to review the circuit court's decision on a writ of certiorari.

STATUTORY PROVISION INVOLVED

28 U.S.C. § 2401. Time for commencing action against United States

> (b) A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

STATEMENT OF FACT

As Americans living in the early 21st century, we take for granted our basic rights to life, liberty and the pursuit of happiness. Still, if asked to stop and reflect upon that which sets us apart in a diverse and complex world, most citizens of this great land would mention these concepts at the top of the list. This case involves the question of whether those blood-won rights should extend to non-combatant children – citizens of friendly nations – kidnaped and kept from their homes during wartime. Yet, this all-important and timely issue will never receive a full hearing if the decisions of the lower courts in this case are allowed to stand. This is so because the applicants' claim for damages under the Federal Tort Claims Act has been dismissed as time-barred. This dismissal has been upheld, even though the record shows that the United States Government planned, procured and executed applicants' detention under a cloak of absolute secrecy which was not lifted for fifty years.

Applicants, Sylvia Knohr Wyatt and Barbara Knohr Hurtado, were born in San Jose', Costa Rica. Both their father and grandfather were born in Costa Rica. In fact, their great-grandfather, Bruno Carranza served as President of the Republic of Costa Rica in 1870. Despite their long family presence in Costa Rica, the Knohr family were deemed "alien enemies" by their own government following the outbreak of World War II. Because of their German ancestry, their government took away their rights, without a hearing and without even notifying them of any charges against them.

In January 1942, the Costa Rican government jailed Erwin Knohr, petitioners' father. There was no formal proceeding to determine the validity of any charges against

him. As a result of Mr. Knohr's incarceration, the family coffee plantation was eventually seized and sold. Soon thereafter, the Knohr children and their mother were placed in confinement. Then, in the dead of night, without warning they were placed on an unmarked ship where they were subjected to cruel treatment and intolerable conditions. The ship stayed at sea for days and the Knohr family had no idea what their fate would be.

Eventually, the family arrived in California, where they were told that they were now under the protection of the Red Cross and the United States Government. Following a brief stay, they next boarded a train to a camp in Crystal City, Texas, where they remained for nearly a year. In 1943, the Knohrs were sent to New York City, where they boarded the ship *Gripsholm*, bound for Germany via Lisbon, Portugal. In Germany they were compelled by the German military to engage in activities such as farm labor and ammunition manufacturing, in order to survive until the end of the war. It was years before petitioners were able to accumulate sufficient resources to leave Germany and return to Costa Rica. Unfortunately, upon their return in 1948, they learned that they would never be reinstated to their family's property and belongings which had either been confiscated or obliterated.

Who was it that violated the lives, liberties and happiness of this remarkable family? Who came up with the false notion that they were somehow allied with German interests and used it as a guise to snatch women and children from their beds in the dead of night? Who finally used these innocents as ransom for the salvation of persons trapped in Germany during the war? For fifty years, the Knohrs thought they knew the truth – that the official Costa Rican government had been behind it all. But they were wrong.

It is now an undisputed fact that the entire plan was developed and accomplished by the United States government, which needed hostages to exchange for Americans trapped by the onset of war in Europe. In a classic example of ends justifying means, it was the U.S. which had the Costa Rican Government label persons of German ancestry as "alien enemies". It was the U.S. which had the Costa Rican authorities take their own citizens hostage. It was the U.S. which, under the guise of protecting them from their own government, had these innocent people shipped to camps in Texas and detained until their usefulness had ripened. It was the U.S. which exchanged them for civilian prisoners of war. Most importantly for the issue now before this Honorable Court, it was the U.S. which shrouded this shameful conduct in secrecy, using its power to hide the truth for decades, until the declassification of wartime "top secrets" allowed the light of truth to shine upon it.

During the course of their ordeal, the Knohr's were repeatedly informed by various representatives of the United States Government that they were being "protected" from the Costa Rican government. Considering the circumstances of the initial seizure of Mr. Knohr by the Costa Rican military and the family's nightmarish detention in the bowels of an unidentified ship, this explanation was believable. What's more, even had they been lead to inquire further about possible U.S. involvement, they would have been barred from discovering any information by the classified nature of the documents pertaining to this clandestine operation. The unequivocal truth is that the U.S. government undertook an extensive, impenetrable program of secrecy to prevent the public or the press from gaining knowledge of its actions.

The secrets of the U.S. government's involvement remained hidden until the mid-1990's, when applicants were informed of a national news program, *Dateline*, which first divulged the truth. Upon viewing this program, petitioners first learned of the reality of U.S. government involvement in their kidnapping and deportation. Specifically, it was revealed that the United States had masterminded and perpetuated a covert program to capture, detain and exchange Latin American residents and nationals to use for hostage exchange. This television program also revealed the meticulous efforts of the U.S. government to hide the truth.

PROCEDURAL HISTORY

Although its involvement was kept secret for these many years, the government now acknowledges that its conduct was wrongful. Following a lengthy "administrative" period, petitioners filed suit in the United States District Court for the Western District of Texas (Del Rio Division). Congress authorized jurisdiction in federal district courts "of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. The matter was brought pursuant to the provisions of the Federal Tort Claims Act (28 U.S.C. § 1346(b), 2671-2680, *et seq.*).

In response, the United States filed a Motion to Dismiss for lack of subject matter jurisdiction under Federal Rules of Civil Procedure 12(b)(1). After reviewing the motion, a magistrate judge proposed, in his Report and Recommendation, that the motion be granted. Petitioners timely filed their objections. The district judge thoroughly reviewed the record, the magistrate judge's recommendation and petitioners' objections, and concluded that the motion to dismiss should be denied. Specifically, the judge said,

"it does not appear certain that plaintiffs can prove no set of facts in support of their limitations argument." Following this order, the matter was referred to the Magistrate for pretrial proceedings.

The parties then agreed to a Joint Motion to Stay, pending certification of an interlocutory appeal. The United States concurrently filed a Motion for Reconsideration. After taking the matter under advisement, the magistrate issued a second recommendation, reiterating the conclusions from his initial report. Additionally, the magistrate recommended that the United States' Motion for Reconsideration be granted. Petitioners timely filed their objections and responses to the Magistrate's recommendation.

During this time, a new district judge had been appointed to the Del Rio Division. The matter was transferred to this new member of the court. Upon his consideration of the magistrate's Supplemental Report and Recommendation, the judge recanted on the court's original order and granted both the Motion for Reconsideration and the Motion to Dismiss.

The order of the district court, dismissing the case for lack of subject matter jurisdiction, on the premise that the statute of limitations had run, was entered on February 3, 2003. The notice of appeal was received by the district court on March 25, 2003. Upon appeal, the United States Court of Appeal for the 5th Circuit, in a Per Curiam Opinion, upheld the district court's order on December 1, 2003, and entered an order denying petitioners' motion for rehearing on February 2, 2004.

In both the Report and Recommendation adopted as reasons by the trial court and in the brief opinion of the court of appeal, the lower courts held that the running of time had not been interrupted because the applicants should have known about the involvement of the United States in their illegal capture and deportation. They specifically hold that plaintiffs should have gained such knowledge when *Hohri v. United States*, 586 F. Supp. 769 (D.D.C. 1984), *affirmed*, 847 F.2d 779 (Fed. Cir. 1988), *cert. denied*, 488 U.S. 925 (1988), was handed down and when the government publication, *"Commission on Wartime Relocation and Internment of Civilians, Personal Justice Denied"* (1982), was issued. As shown below, neither of these publications could reasonably be seen to have provided applicants with knowledge of the government's conduct toward them.

For reasons more fully set forth herein, Sylvia Knohr Wyatt and Barbara Knohr Hurtado now apply to this Court for review of the decisions of the lower courts which would deprive them of their opportunity to be heard.

REASONS FOR GRANTING THE PETITION

I. This Court Should Review this Matter Because the Actions of the Lower Courts Are in Direct Conflict with the Prior Decisions of Other Circuits and Also with its Own Previous Holdings in the Following Instances:

A. The Limitation Period of the Federal Tort Claims Act is Not Jurisdictional in Nature and Is Subject to the Equitable Doctrines of Tolling and Estoppel.

The opinion of the United States Court of Appeal for the 5th Circuit, *Wyatt v. United States*, 81 Fed. Appx. 508, 2003 WL 22843140 (5th Cir. Tex) is a terse per curiam, in which the trial court's acceptance of the Report and Recommendations of a magistrate is itself accepted without substantial analysis. Review of this holding must take into consideration the opinion which it upheld when it affirmed the dismissal of applicants' case. This is especially true where, as here, the intermediate court did not review the dismissal *de novo*, as it was required to do. Because the appellate court's only ruling was that "the district court did not abuse its discretion . . .", we must consider the Report and Recommendations of the magistrate which are at the foundation of the Order of Dismissal. In so doing we shall see that the ruling was simply wrong. It should not have given rise to the likewise inappropriate, cursory review on appeal.

In its holding the court (through the magistrate's recommendation) stresses the concept that the statute of limitations in FTCA cases is "jurisdictional". Presumably the argument therefore goes that principles applicable to the tolling of limitations should not apply. For example, the Order

states, "This Court also notes that the time limits for filing an FTCA claim against the United States are jurisdictional and strictly construed. [arguably eliminating the application of the doctrine of equitable tolling.] the *Houston v. United States Postal Serv.*, 823 F.2d 896, 902 (5th Cir. 1987). *See also United States v. Kubrick*, 444 U.S. 111, 117-18 (1979)." Further, the magistrate judge's Report and Recommendations also provide that "It is well established that the FTCA limitations period is a jurisdictional prerequisite. *See Flory v. United States*, 138 F.3d 157, 159 (5th Cir. 1998)." But the use of these cases to eliminate the doctrine of equitable tolling (or other principles by which the statute of limitations is de facto extended) has been rejected by this Honorable Court. In *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 111 S. Ct. 453 (1990), the Court expressly held that principles of equitable tolling do apply to suits against the United States. The Court stated that equitable tolling is permissible where, as here, the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass. Thus, the notion that the U.S. government could purposefully hide the truth about its direct involvement in applicants' injury and still argue the statute of limitations as an absolute defense should have been set to rest by the case law.

Within the 5th Circuit, there exists a continuing conflict involving the question of whether the limitations period of the Federal Tort Claims Act is jurisdictional in nature and if so, how the doctrines of equitable tolling or estoppel could be applied. (Compare *Perez*, 167 F.3d at 915-16 (holding that the two-year limitations period is not jurisdictional) with *Flory*, 138 F.3d at 159 (holding that the FTCA's two-year limitations period is jurisdictional) and *Johnston*, 85 F.3d at 218 n.2 (same) and *MacMillan v. United States*, 46 F.3d 377,

380 n.3 (5th Cir. 1995) (same).) Colella, Ugo; Bain, Adam; *Revisiting Equitable Tolling and the Federal Tort Claims Act: Putting the Legislative History in Proper Perspective*; 31 Seton Hall L. Rev. 174 (2000).

In addition to the conflict within the 5th Circuit, there exists additional conflict within the decisions of the 6th Circuit and the 7th Circuit. In the Sixth Circuit compare *Miller v. United States Postal Serv.*, 995 F.2d 1067, 1993 WL 64144, (6th Cir. 1993) (unpublished table decision) (holding that the FTCA's limitations periods are jurisdictional), *Willis v. United States*, 972 F.2d 350, 1992 WL 180181 (6th Cir. 1992) (unpublished table decision) (same), *Horten v. United States*, 961 F.2d 1577, 1992 WL 102719 (6th Cir. 1992) (unpublished table decision) (affirming dismissal for lack of subject matter jurisdiction where plaintiff did not comply with FTCA's two-year limitations period), with *Glarner*, 30 F.3d at 701 (holding that FTCA's limitations periods are not jurisdictional). *Id.* And, in the Seventh Circuit compare *Kanar*, 118 F.3d at 530-31 (opinion by Easterbrook, J.) (holding that the Act's limitations periods are not jurisdictional), with *Goodhand*, 40 F.3d at 214 (opinion by Posner, C.J.) (holding that the limitations periods in the FTCA are jurisdictional), and *State Farm Ins. Co. v. United States*, 6 F. Supp. 2d 985, 987 (N.D. Ill. 1998) (same), and *Burns v. United States Dept. of Justice*, 864 F. Supp. 80, 81 (N.D. Ill. 1994) (same), and *Willis v. United States*, 879 F. Supp. 889 (C.D. Ill. 1994), *aff'd*, 65 F.3d 171 (7th Cir. 1995) (unpublished table decision) (Posner, C.J. & Easterbrook, J. on panel) ("We express no opinion on whether Irwin transformed the statute of limitations from a jurisdictional prerequisite to an affirmative defense. . . ."). *Id.*

Issues involving questions of jurisdiction and equitable tolling are, arguably, analytically distinct. *Id.* Problems arise, as theorized by the authors in *Revisiting Equitable Tolling and the Federal Tort Claims Act: Putting the Legislative History in Proper Perspective*, *supra*, when Courts combine the two issues into their discussion of the FTCA's statute of limitations. The lack of clarity on this distinction could explain the inter-Circuit split on the issue of whether the FTCA's limitations periods are jurisdictional. The 5th, 6th 7th and 8th Circuits have held that the FTCA's limitations periods are not jurisdictional. *Perez v. United States*, 167 F.3d 913, 915-16 (5th Cir. 1999); *Kanar v. United States*, 118 F.3d 527, 530-31 (7th Cir. 1997); *Glarner v. United States Dep't of Veterans Admin.*, 30 F.3d 697, 701 (6th Cir. 1994); *Krueger v. Saiki*, 19 F.3d 1285, 1286 (8th Cir.), *cert. denied*, 513 U.S. 905 (1994). However, the 1st, 2d, 3d, 5th, and 10th Circuits have all held that the FTCA's limitations periods are jurisdictional. *Johnson v. Smithsonian Inst.*, 189 F.3d 180, 189 (2d Cir. 1999) *Flory v. United States*, 138 F.3d 157, 159 (5th Cir. 1998); *Coska v. United States*, 114 F.3d 319, 322 (1st Cir. 1997); *Deutsch v. United States*, 67 F.3d 1080, 1091 (3d Cir. 1995); *Goodhand v. United States*, 40 F.3d 209, 214 (7th Cir. 1994); *Attallah v. United States*, 955 F.2d 776, 779 (1st Cir. 1992); *Bradley v. United States*, 951 F.2d 268, 270 (10th Cir. 1991).

In order to resolve these conflicts, both within the 5th Circuit and among the various Circuits, the Court should grant applicants' request for review.

B. A Claim, under the Federal Tort Claims Act, Cannot Accrue When the Victims Do Not Have Notice of Facts That Give Rise to a Particular Cause of Action; and There Is No Duty of a Victim to Investigate the Existence of a Cause When the Tortfeasor Has Actively Concealed Material Facts.

"A cause of action accrues, under federal law, when the plaintiff knows or has reason to know of injury which is the basis of the action." *Brown v. Nationsbank Corp.*, 188 F.3d 579, 590 (5th Cir. 1999). Federal law determines when a claim accrues against the government within the meaning of § 2401(b) of the FTCA. *Ware v. United States*, 626 F.2d 1278 (5th Cir. 1980) citing *Mendiola v. United States*, 401 F.2d 695 (5th Cir. 1968). The standard set forth in *Mendiola v. United States*, allows divergence from "the general rule" of accrual and permits claims to accrue when the plaintiff discovers the basis for the cause of action. *Id.* The rationale for the "discovery rule" is to protect innocent plaintiffs who are not aware of their claims because the facts that establish a causal link between the injury and its cause are not discoverable. *United States v. Kubrick*, 444 U.S. 111, 100 S. Ct. 352 (1979). The rule is clearly applicable in this case.

In recent years, there has been a substantial expansion of the applicability of the "discovery rule". Cases in most of the circuits have reviewed and adopted the concept, which has its basis in equity and fairness. One example of such an expansion can be seen from the 5th Circuit itself, in *Ware v. United States*, 626 F.2d 1278 (5th Cir. 1980). A dairy farmer was informed by U.S. government officials that 246 head of cattle in his herd were infected with tuberculosis. As a result of this diagnosis, the government killed the "diseased" stock. Several years later, Ware learned that the government had

misdiagnosed 243 of the 246 cattle, and that only three of the cattle were actually diseased. "In this instance, the injury was the killing of the healthy cattle. The negligent act was the misdiagnosis. But until Ware learned of the destruction of the healthy cattle, no damage was discernible to him, since he labored under the mistaken belief that his cattle, being tubercular, merited death." Since Ware had no reason to suspect the government's error, he did not know that his loss was compensable. What's more, accrual cannot commence until the " damage is discernible," *Mendiola v. United States*, 401 F.2d 695 (5th Cir. 1968).

In *Stoleson v. United States*, 629 F.2d 1265 (7th Cir. 1980), plaintiff was an employee at a munitions plant under government contract. During the course of her employment, Stoleson was constantly exposed to nitroglycerin, which began causing her withdrawal-induced angina attacks on weekends when she was not working. The causal relationship between the plaintiff's symptoms and the occupational nitroglycerin exposure was not medically documented until more than 2 years after plaintiff first experienced symptoms. The relevant question presented to the 7th Circuit was — when did Stoleson's claim accrue? In answering this question, the Court stated that plaintiff's claim did not accrue "when she read . . . the newspaper article suggesting a possible link . . . nor did it accrue . . . when the state occupational safety specialist . . . expressed an opinion confirming Mrs. Stoleson's suspicion." *Id.* "Suspicion [must] ripen into knowledge of the missing critical fact-causation." *Id.* at 1270-1271.

The 2d Circuit, in *Kronisch v. United States*, 150 F.3d 112, 116 (2d Cir. 1998), held that "In cases . . . where the government conceals the acts giving rise to the plaintiff's

claim, or where plaintiff would reasonably have had difficulty discerning the fact or cause of injury at the time it was inflicted, the so-called 'diligence-discovery rule of accrual' applies." *Id. Kronisch* involved a plaintiff who brought an action for damages on behalf of the estate of Glickman, who was the unwitting subject of clandestine CIA drug testing experiments in the 1950s. Not only did the government conceal the information necessary to substantiate the plaintiff's claim, but it also destroyed the records relating to these experiments.

In *Plaza Speedway Inc. v. United States*, 311 F.3d 1262 (10th Cir. 2002), the Court applied the discovery rule to a claim under the FTCA wherein claimants purchased property adjacent to property where the United States Army "had conducted numerous operations . . . whereby jet fuel, solvents and various chemicals were employed . . . over the years." When the claimants purchased the adjacent property in 1989, they were aware of the Army's activity on the adjacent land. Nonetheless, the new owners did not seek an environmental assessment of their property. Several years later, in 1993, an environmental geologist contacted the owners to discuss "chemical contamination of their property." The Court held that, "the discovery rule tolled the running of the limitations period only until August 1993 when the State's environmental geologist informally phoned the owners to discuss the contamination on their property." *Id.*

In the 11th Circuit, the statute of limitations is tolled when the plaintiffs were prevented from pursuing their claims due to inequitable circumstances. *Rosner v. United States*, 231 F. Supp. 2d 1202 (S.D. Fla. 2002) *citing Ellis v. General Motors Acceptance Corp.*, 160 F.3d 703, 706 (11th Cir. 1998); and *Justice v. United States*, 6 F.3d 1474, 1475, 1479

(11th Cir. 1993) (stating that equitable tolling is applied when necessary to prevent an injustice). In *Rosner*, Hungarian Jews sued the government claiming that the United States wrongfully refused to return property expropriated by pro-Nazi Hungarian government during World War II and subsequently seized by the United States Army. The United States filed a motion to dismiss. The Court stated that, "Because this issue is arising on a motion to dismiss, the Court must accept as true that "plaintiffs and other members of the class have been kept in ignorance of vital information essential to pursue their claims, without fault or lack of diligence on their part." Considering this, the Court held,

> Taken as true, these allegations present the Court with a set of circumstances that warrant equitable tolling of the limitations period. In addition, the Court notes that, for the majority of Plaintiffs, the years following World War II were particularly difficult. This, combined with the fact that the Government cannot benefit from its own alleged misconduct, tips the balance in favor of tolling the limitations period. Accordingly, at this stage in the proceedings, given the equitable considerations at play in this case, Plaintiffs are entitled to the benefit of equitable tolling and their Complaint is timely.

Id. at 1209.

In cases where the defendant has engaged in "some misleading, deceptive or otherwise contrived action or scheme, *in the course of committing the wrong*," the defendant has the burden of proving that the plaintiff did not

exercise due diligence. *Hobson v. Wilson*, 737 F.2d 1, 237 U.S. App. D.C. 219 (C.A.D.C. 1984) (*overruled in part on other grounds*).

> [W]hen plaintiff shows that defendants committed affirmative acts of concealment with respect to a potential claim, defendants must meet a more stringent standard to bar a plaintiff on the ground that he was on notice of his claim notwithstanding the defendants' attempt to conceal it. *Hobson*, 737 F.2d at 35. Specifically, a defendant who has engaged in fraudulent concealment, in order to make out a defense based on the plaintiff's lack of due diligence, must show something closer to actual notice than the merest inquiry notice that would be sufficient to set the statute of limitations running in a situation untainted by fraudulent concealment. The fraudulent concealment by its nature makes discovery of the true facts more difficult, in part because it obscures the significance of such information as (it) comes to plaintiff's attention.

Riddell v. Riddell Washington Corp., 866 F.2d 1480, 1491, 275 U.S. App. D.C. 362, 373 (C.A.D.C. 1989).

Although few courts have considered in detail the difference between "inquiry notice" and the near-actual type of notice sufficient to end a period of equitable tolling, the D.C. Circuit Court of Appeals offered the following explanation in *Hobson*:

> By "notice," we refer to an awareness of sufficient facts to identify a particular cause of action, be it

> a tort, a constitutional violation or a claim of fraud. We do not mean the kind of notice—based on hints, suspicions, hunches or rumors—that requires a plaintiff to make inquiries in the exercise of due diligence, but not to file suit. *Garamendi v. SDI Vendome S.A.*, 276 F. Supp.2d 1030, 1042-1043 (C.D.Cal., 2003) quoting *Hobson*.

Thus, the case law establishes the concise rule that accrual cannot occur and time limits cannot begin to run until evidence of defendant's wrongdoing is discernible and therefore discoverable. *A fortiori*, where the conduct of the defendant itself plays a role in keeping the injured party from learning of its role in his injury, the running of time should be tolled. In the case *sub judice*, the defendant has used its inherent power to hide its wrongful conduct under the guise of military necessity for secrecy. The top secret documents which prove its conduct were only recently declassified by the respondent. What's more, the government has never offered any proof of the applicants' lack of diligence. In fact, once they received actual notice of their claims, applicants proceeded to timely file an administrative claim. Thus far, the government has avoided responsibility for its actions first by concealing the information necessary for petitioners to be aware of their cause of action and then by promoting the convoluted reasoning that the failure to act on the part of the applicants allows it avoid liability for its actions. Such reasoning makes a mockery of concepts of fairness and due process embodied in the case law. This is the reason why some circuits require no showing of due diligence on the part of the plaintiff to toll the limitations period whenever there has been some positive act of concealment by the defendant. *Hobson citing Tomera v. Galt*, 511 F.2d 504, 510 (7th Cir. 1975) (*overruled in part on other grounds*).

Other Courts have held that it is not necessary for every potential claimant to examine every document that is available in order for the discovery rule to apply. *Orlikow v. United States*, 682 F. Supp. 77, 85 (D.D.C. 1988); *Schock v. United States*, 21 F. Supp. 2d 115, 119 (D. R.I. 1998). The Court in *Orlikow* determined that publications did not constitute notice and thus did not trigger the statute of limitations. "Without *actual notice* or without having read the articles it would go too far to state that the statute of limitations began to run when the articles were published." (Emphasis added.) *Id.* at 85. The facts in *Orlikow* involved a covert research project involving brainwashing and interrogation techniques established and developed by the CIA in the 1950s. Various aspects of this massive project were subcontracted out to research institutions. Since this research was only indirectly funded by the CIA, many of those who participated in these experiments were completely unaware of any Agency involvement. The *Orlikow* plaintiffs alleged concealment of the nature and extent of government involvement. The U.S. contended that "numerous articles and programs detailing the [covert] funding 'should have' put [the plaintiffs] on notice." *Id.* These publications included a book, several television programs, and news articles. The Court held that a plaintiff must possess "actual knowledge of facts sufficient to justify a claim." *Id.* at 84.

In *Schock*, the plaintiff was the sole heir of decedent, whose attorney allegedly converted funds belonging to the decedent. The Court was presented with the issue of "whether the discovery rule applies to a conversion claim brought under the FTCA." *Id.* at 118. In holding that the discovery rule did apply to the claim presented, the Court reiterated that "plaintiffs who suffer from blameless ignorance" are protected by this rule. *Id.* at 119 (citing *Kubrick*). Although,

as the sole heir of decedent's estate had "immediate access to testamentary documents, bank statements and other financial records [i.e. legal power to access these records] . . . the discovery rule does not require every potential claimant to examine every document that he or she has the legal power to examine." *Id.*

Yet another instance of the application of the discovery rule occurred in *Barbour v. Head*, 178 F. Supp.2d 758 (2001), a claim for copyright infringement began to accrue when the copyright holder became aware of allegedly infringing work, not when the allegedly infringing work was published. Because the purpose of the "discovery rule" is not to encourage or reward simple paranoia, *Thompson v. United States*, 642 F. Supp. 762, 768 (N.D. Ill. 1986), the plaintiff in *Barbour* was not required to search for publications that infringed upon a copyright. The claim did not begin to accrue until the copyright holder became aware of the infringing work.

And in *Thompson*, the Court held that "[k]nowledge of cause [of the injury] cannot be imputed simply from the fact of injury." 640 F. Supp. 762, 766. The plaintiff's "wondering [*i.e.*, layman's suspicion or subjective belief,] based on materials he had read [was] not enough to start the statute [of limitations] running." *Id.*

The court in *Heinrich v. United States*, 44 F. Supp.2d 408 (Ma. 1999), determined that the plaintiffs claims were filed within two years of the date that *they discovered* the defendant's wrongdoing; thus, their claims were not barred by the statute of limitations. The Court also stated that although several newspaper articles, medical journals, and Congressional reports published the defendant's wrongdoing

more than two years before the plaintiffs filed their claims, the defendant failed to present evidence that the plaintiffs read the publications. *Id.*

Despite this overwhelming body of precedent, including decisions from the court itself, the 5th Circuit refused to address the inequities in the case before it. Instead, the court blindly adopted the flawed reasoning of the magistrate of the lower court by concluding that a "reasonable person would have been on notice long before 1994 that the United States Government was involved in [their] detention and subsequent transfer to Germany – or would have inquired further." The basis for the decision of the Courts below is the existence of an obscure government publication[1] discussing the plight of Americans of Japanese descent during World War II and the publication of the decision in *Hohri v. United States*, 586 F. Supp. 769 (D.D.C. 1984), *affirmed*, 847 F.2d 779 (Fed. Cir. 1988), *cert. denied*, 488 U.S. 925 (1988).

In *Hohri*, the central issue was whether the government had concealed the knowledge that no military necessity existed for the imprisonment of Japanese Americans during World War II. The Court found that this fact had indeed been concealed, and tolled the limitations period – until 1982 when the Commission on Wartime Relocation and Internment of Civilians was given its mandate. While the Commission report may have alerted the Japanese American plaintiffs in *Hohri*, the petitioners in the case *sub judice* were not Japanese Americans. They were not Peruvian Japanese. They were not German Americans nor permanent resident aliens of the United States. They were citizens of Costa Rica. Unlike

1. *Commission on Wartime Relocation and Internment of Civilians, Personal Justice Denied* (1982).

Executive Order 9066, the plan to capture plaintiffs was created in secrecy by General George Marshall and his staff and was not public knowledge.

The report which is the bedrock of the lower Court's erroneous dismissal is *"Commission on Wartime Relocation and Internment of Civilians, Personal Justice Denied"* (1982). The Congressional Commission was established by Public Law 96-317 and was given but three charges:

> First, to "review the facts and circumstances surrounding Executive Order 9066 [signed by President Franklin D. Roosevelt, EO 9066 was used to exclude and incarcerate the vast majority of persons of Japanese ancestry] . . . and the impact of such Executive Order on American citizens and permanent resident aliens." Second, to "review directives of United States military forces requiring the relocation and, and in some cases, detention in internment camps of American citizens, including Aleut civilians, and permanent resident aliens of Aleutian and Pribilof Islands"; and, third, "to recommend appropriate remedies." Commission on Wartime Relocation and Internment of Civilians, *Personal Justice Denied*, The Civil Liberties Public Education Fund 1997 at page xvii. (Emphasis added.)

The scope of the powers granted to the Commission on Wartime Relocation and Internment of Civilians did not extend to include any investigation into the kidnapping, internment and deportation of Latin American citizens.

Although the Commission on Wartime Relocation had absolutely nothing to do with applicants, the lower courts held that the report of the Commission should have somehow notified petitioners of surreptitious activities of the Government against them. This reasoning is wholly unfounded considering the limited scope of the Commission's charges and the continued "top secret" classification of the proof of the government's conduct. Even if it had wanted to, the Commission could not have gotten the pertinent documentation until it was declassified. For over 50 years, the atrocities suffered by Latin Americans of German descent have been ignored by the U.S. government through a continuous scheme of hiding the truth surrounding its actions. Nonetheless, the existence of two particular sections of the Commission's Report are the basis for the lower Courts' determinations.

One chapter of the Commission Report focuses on German Americans and permanent resident aliens of German descent in the United States. Beginning on p. 285 of the Commission report, the Commission states that, "[I]n the spring of 1942 the War Department seriously considered whether the power of Executive Order 9066 should be used to exclude from certain areas all German and Italian aliens . . ." However, "any mass movement of Germans and Italians was effectively opposed." Commission report at p. 286. In fact, on May 15, 1942, it was recommended to the President that "under the Executive Order, area commanders be allowed to exclude from militarily sensitive areas particular individuals, but *not classes of Germans or Italian aliens*." Commission report at p. 287 emphasis added.

In the appendix on Latin America, the Commission focuses on internees, "particularly those of Japanese

ancestry." Commission report at p. 305. Of all the Latin American internees, over two-thirds were Japanese nationals with over eighty percent coming from Peru. Commission report at p. 305. The Commission concludes the appendix by admitting that, *"[h]istorical documents concerning the ethnic Japanese in Latin America are, of course, housed in distant archives, and the Commission has not researched that body of material."* Commission report at p. 314. What's more, the Commission acknowledges that "the need for this extensive, disruptive program has not been definitively reviewed by the Commission." Commission report at p. 314. Through this acknowledgment, it is clear that the circumstances surrounding the claim of petitioners had not yet been explored at the time of the Commission's report.

The distinctions between the petitioners and the Japanese Americans who were the focus of the Commission's report have been recognized by the United States government as is evidenced by the legislation sponsored by Senator Russell Feingold, the Wartime Treatment Study Act, which proposed an independent Congressional Commission to look at the United States' policy regarding German and Italian Americans, European Latin Americans, and the refugee immigration policies of the World War II era. The last major action on this bill occurred on March 14, 2002 when it was placed on the Senate Legislative Calender for the 107th Congress. The future of this legislation is uncertain in light of the events that shook this country on September 11, 2001, wherein Congress shifted its focus to an ongoing "war on terrorism."

However, even if petitioners had been aware of the Commission's Report (which they were not), there is no information that would have put petitioners on "inquiry

notice" of potential claims. In fact, the information contained in the report would have had the opposite effect by confirming the rationale, as explained by United States' officials, for their capture and internment – the government always told petitioners that they were being protected by the United States and the Red Cross. The unconscionable acts of the U.S. government were kept absolutely secret, known only to agents of the respondent. As frightened noncombatants taken from their home by Costa Rican soldiers in the dead of night, applicants, who were children at the time, had no reason to suspect U.S. involvement. Furthermore, they were lead to believe they were being protected by the United States against dangerous factions within their own country.

Again, further hindrance to the petitioners' knowledge of the truth surrounding their internment and deportation was the fact that State Department documents were not available to the general public. The documents that pronounce the government's involvement were only declassified in the 1990's. Lea Thompson, "Round-up," *Dateline NBC*, November 30, 1994. The truth could not be obtained from classified records hidden deeply in stacks of papers at the National Archives in Washington, D.C.

If the obscure nature of the documentation that divulges the United States government's involvement is not apparent, then consider the scholarly work of Dr. Max Paul Friedman who published – *Nazis & Good Neighbors: The United States Campaign Against the Germans of Latin America in World War II* in late 2003. This publication is the product of Dr. Friedman's extensive research of many old and recently declassified documents located in no fewer than seven countries. Such a feat required not only the ability to travel to various remote portions of the world, but also the ability

to read the archived documents written in at least three different languages. Through his tireless inquiry, Dr. Friedman was able to piece together a story of how the United States influenced the governments of Latin American countries to name and capture their own citizens. The incentive for the Latin American governments was apparently economic – if they capture their citizens for the United States, then the Latin American governments were rewarded with the property of the imprisoned individuals.

In light of the difficulties encountered, even to this day, in learning the truth about what happened to your applicants, in light of the active role played by the respondent in the keeping that information from applicants and in light of the extensive jurisprudence which protects innocent claimants against the conduct of tortfeasors who injure them while hiding the fact of their involvement in such injury, applicants urge this Honorable Court to review the rulings of the lower courts which effectively validate the outrageous conduct of the respondent in this case. They are certain that such a review will return them to the trial court where they will have the opportunity to present the merits of their case.

II. A De Novo Review Should Be Conducted of a Determination of When a Claim Accrues as a Matter of Law under the Federal Tort Claims Act; and If the Doctrine of Equitable Tolling Applies to a Claim.

The determination of when a claim accrues under the FTCA is a question of federal law. *Ramming v. United States*, 281 F.3d 158 (5th Cir. 2001); *Johnston v. United States*, 85 F.3d 217 (5th Cir. 1996). Questions of law are reviewed de novo. As the magistrate's report in this case recognized, "[I]n the present case, the threshold issue is determining when

the plaintiffs' claim accrued." Record of the Court at p. 68. The applicability of equitable tolling (or estoppel) to the facts is a question of law that is reviewed de novo. *Ramirez v. City of San Antonio*, 312 F.3d 178, 183 (5th Cir. 2002) *citing Tyler v. Union Oil Co.*, 304 F.3d 379 (5th Cir. 2002) and *Rhodes v. Guiberson Oil Tools Div.*, 927 F.2d 876 (5th Cir. 1991).

The court below did not conduct a de novo review of the record. In it's cursory, Per Curiam opinion, the Court memorializes its error at page 3, "[T]he district court *did not abuse its discretion* in deciding that equitable tolling did not apply. *Teemac v. Henderson*, 298 F.3d 452, 457 (5th Cir. 2002)." In *Ramirez*, *supra*, the Court below noted that "[A]lthough one recent case suggests that the proper standard is abuse of discretion, *Teemac*, 298 F.3d at 457, we are bound by the earlier precedent." *Ramirez* 312 F.3d at 183 n.5. What's more, in *Martinez v. Department of U.S. Army*, 317 F.3d 511, 512 (C.A. 5 (Tex.) 2003) *citing Randel v. United States Department of Navy*, 157 F.3d 392, 395 (5th Cir. 1998), the 5th Circuit stated that it "reviews dismissals for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1) based on questions of law de novo."

The case at bar involves a motion to dismiss for lack of subject matter jurisdiction wherein the threshold issue was when the petitioners claim accrued under the FTCA. Based upon the precedent established in the jurisprudence, the Court below erred in applying an abuse of discretion standard to an issue that should have been reviewed de novo.

III. A Motion for Reconsideration of an Order Should Not Be Granted When There Is No Change in Circumstances or Discovery of New Evidence;

The order on the motion to dismiss filed by the government was essentially rendered twice by the district court. At the time of its filing, on April 19, 2002, Judge Biery considered the motion to dismiss. After reviewing the record, the report and recommendations of the Magistrate Judge, and the objections filed by petitioners, the court denied the motion to dismiss. In doing so, Judge Biery stated:

> . . . this court finds it does not appear certain that plaintiffs can prove no set of facts in support of their limitations argument. Plaintiffs were children in 1942 when they were forced from their home by Costa Rican military personnel, confined aboard a military vessel in deplorable conditions, transferred to the United States, held in Crystal City, Texas, for approximately one year, then removed to Germany, where they were exchanged for American civilians trapped by the war. The 1982 report issued by the Commission on Wartime Relocation and Internment focused primarily on the internment of American citizens of Japanese ancestry. Plaintiffs, who were not Americans at the time of their release, were of a different race and nationality than the subjects upon which the report focused. The *Hohri* case, which referenced the report, was brought by Japanese-American detainees and addressed race-based wrongs committed against American civilians, living in America, detained in America by Americans, pursuant to a widely-publicized executive order.

> *Hohri v. United States*, 586 F. Supp. 769 (D.D.C. 1984) *aff'd in part & rev'd in part*, 782 F.2d 227 (D.C. Cir. 1986) *vacated with instructions to transfer*, 482 U.S. 64 (1987). Here, plaintiffs were citizens of Costa Rica – children living in their own country – when they were arrested by the military, detained in a foreign country, and subsequently exchanged for American civilians in Germany, as part of a "top secret" or "classified" operation of the United States government. Based upon the nature and circumstances of plaintiffs' injuries, to do substantial justice the motion to dismiss is denied.

Despite Judge Biery's well reasoned analysis, the August 16, 2002 ruling of the Court below was later disturbed after a change in the composition of the District Court for the Western District of Texas gave rise to the transfer of this case to a new judge. Over two months later, the government filed a motion for reconsideration. Although there had been no change in the record, on the January 31, 2003 Judge Garcia adopted the original Report and Recommendation of the magistrate. In doing so, he granted the government's 12(b)(1) motion to dismiss, and permitted the government to have a "second bite at the apple."

Petitioners contend that the court below erred in granting the motion for reconsideration when the movant failed to demonstrate any reason for reconsideration except that it did not generally agree with the well reasoned ruling of Judge Biery.

CONCLUSION

Abuse by the United States government of the fundamental rights of persons to enjoy life, liberty, and the pursuit of happiness is a timeless issue. Though the government now admits to its role in this heinous plan of kidnaping and trading human beings, the lower courts have allowed the respondent to avoid answering for its actions by hiding behind a procedural anomaly — the refusal of the lower courts to apply the equitable doctrines of estoppel and/or tolling to cases that involve a waiver of sovereign immunity under the FTCA. This case precisely demonstrates the injustice that results from this unanswered question of law. Petitioners, Sylvia Knohr Wyatt and Barbara Knohr Hurtado, urge this Court to finally end the uncertainty that surrounds the nature of the limitations period of the Federal Tort Claims Act by answering the questions that they have presented for review.

The issues presented by this case are monumentally important to this country. They are not merely matters of historic curiosity. They have great significance for today's citizen, not just those who survived the ravages of the last World War. In this time of regional conflict and a world-wide war against terrorism, nothing could be more relevant and timely than a close scrutiny of our national conscience, especially as it regards the rights of innocent people, caught up in the turmoil of international strife.

Our government does not and cannot make a defense of its conduct toward the Knohr family. Instead, it attempts to retreat to the shelter of technicality to avoid responsibility for its actions toward innocent people. Applicants have shown that these technical arguments are inadequate to prevent them

from accessing the courthouse. No statute of limitations should be allowed to fade from our collective memory the wrongs perpetrated here. Instead, we must ask ourselves – how long are the deadlines in the search for justice? The answer, where truth has been hidden by the perpetrator of the wrong, where harms beyond measure would be swept under the rug of time and where no amount of false rationalization can justify outrageous conduct, is that there are no time limits.

Respectfully submitted,

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